Supreme Court, U.S.
FILED
MAY 23 1995
CLERK

No. 94-1731

In the

Supreme Court of the United States

October Term, 1994

JOHN G. ROWLAND, GOVERNOR OF THE STATE OF CONNECTICUT, LINDA D'AMARIO ROSSI, COMMISSIONER, STATE OF CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioners,

v.

JUAN F., ET AL.,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF OF THE STATES OF FLORIDA, et al. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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JOHN G. ROWLAND, GOVERNOR OF THE STATE OF CONNECTICUT, LINDA D'AMARIO ROSSI, COMMISSIONER, STATE OF CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES,

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INTEREST OF THE AMICI CURIAE

Amici states are often parties to institutional reform consent decrees, and other types of consent decrees. *Amici* respectfully submit this brief in support of petitioner, John G. Rowland, Governor of the State of Connecticut, and other petitioners.

The Second Circuit's decision in this case graphically illustrates the need for principled guidelines for federal courts when confronted with a demand to increase the obligations of a state governmental entity under a consent decree. The Second Circuit approved the district court's expansion of a consent decree so as to require Connecticut's Department of Children and Families to hire 490 employees pursuant to a timetable unilaterally set by the district court. *Juan F. by and through Lynch v. Weicker*, 37 F.3d 874 (2d Cir. 1994). *Amici* assert that federal courts have no authority to increase the obligations of an unconsenting state governmental entity beyond the terms of the consent decree where no violation of federal law has been adjudicated, and respectfully request that this Court grant certiorari to address the issues raised by this case.

ARGUMENT

I. A FEDERAL COURT'S EXPANSION OF THE OBLIGATIONS OF A STATE GOVERNMENTAL ENTITY UNDER AN INSTITUTIONAL REFORM CONSENT DECREE PRESENTS A NATIONAL PROBLEM REQUIRING RESOLUTION BY THIS COURT.

A. The instant case graphically illustrates the need for this Court to articulate strict standards preventing unilateral expansion of state obligations beyond the express terms of a consent decree.

In the instant action, Connecticut's Department of Children and Families (DCF) entered into a consent decree to reform the state child welfare system. The decree was agreed to prior to any adjudication on the merits; the state was never found to be in violation of any federal constitutional provision or law. Under the terms of the decree, DCF was required to meet certain caseload ratios by July 1994; the decree specifically left it to DCF to determine how to meet the ratios. Most importantly, because the number of DCF cases fluctuates, the decree contained no hiring timetables or hiring quotas. When the Connecticut General Assembly failed to fund all of the caseworker positions that DCF requested to comply with the decree, DCF developed a plan that would enable it to be in

substantial compliance with the caseload ratios by the July 1, 1994 deadline. Despite the fact that it was more than one year before the compliance deadline and that DCF was at the time in compliance, respondents notified the court-appointed monitor that they would seek contempt and other relief in the district court.

On June 15, 1993, the monitor issued a report recommending that the consent decree be modified based on his prediction that DCF would not be in 100% compliance by the July 1, 1994 deadline. The district court adopted the monitor's recommendations, on June 25, 1993, and ordered that DCF hire 248 case workers by July 1, 1993,[1] and 242 case workers by January 1, 1994. Neither these deadlines nor the hiring quotas are contained in the consent decree agreed to by the parties.

On appeal, the Second Circuit upheld the district court's order and ruled that the district court's accelerated hiring timetable was not a modification of the decree. In the alternative, the Second Circuit held that even if the hiring timetable was a modification, it satisfied the criteria announced by this Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748 (1992). In *Rufo*, this Court held that when a significant factual or legal change occurs, the federal district court must first determine whether a decree modification is 'warranted'; and if so, whether the proposed modification is 'suitably tailored' to the changed circumstance. *Rufo*, 112 S.Ct. at 760. The Second Circuit held that the district court's order was not a modification of the decree because the district

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[1] Six days later.

court's accelerated hiring timetable ensured compliance with the time frame for meeting caseload ratios established by the decree. Alternatively, the Second Circuit reasoned that under *Rufo*'s standard, the Connecticut General Assembly's failure to appropriate all the requested funds constituted a significant factual change justifying the accelerated hiring timetable ordered by the district court.

Amici submit that the Second Circuit erred when it determined that: (1) the district court's accelerated hiring timetable was not a modification of the decree; and that (2) even if it was, it passed constitutional muster because it satisfied the *Rufo* criteria for decree modification. This case illustrates the need for principled standards for federal courts to evaluate demands to expand a state's obligations under a consent decree, where the state has not been held to have violated federal rights.

Rufo does not address the situation presented by this case: what standards apply to a demand by plaintiffs to increase a state governmental entity's obligations under a consent decree absent an adjudicated violation of federal rights. The parties in *Rufo* did not brief the issues raised in this case, nor were they considered by this Court. Rather in *Rufo*, the sheriff of Suffolk County, Massachusetts, moved to reduce the state's obligations under a consent decree which county officials had entered into after a district court held that the conditions at the Suffolk County jail were constitutionally deficient. The order required construction of a new jail facility: the sheriff sought to allow double bunking in some cells, to raise the capacity of the new jail. The sheriff argued that this modification was required by a legal change, this Court's decision in *Bell v. Wolfish*, 441

U.S. 520 (1979), and a factual change, an increase in pretrial detainees. The district court rejected the proposed modification, in part because, in the court's view, one of the underlying, but unstated, purposes of the decree was to provide single cells, and the First Circuit affirmed. *Rufo*, 112 S.Ct. at 759. Rejecting that reasoning, this Court held that "[m]odification of a consent decree may be warranted when changed factual conditions make compliance with the decree more onerous." *Id.*, at 760.

Because *Rufo* does not address the problems presented by the Second Circuit's holding in this case, this Court should grant review. *Amici* submit that a federal court's remedial power in a consent decree where no violation of federal law has been adjudicated is authorized solely by the parties' consent. *Local No. 93, International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 522 (1986).[2] Consequently, a federal court has no power to increase the obligations of a party beyond those set out in the decree. It follows that federal courts are bound by the text of the decree in evaluating demands for modification and must reject demands that increase a party's obligations beyond the terms agreed to. A textual approach to consent decree modification would prevent the result of the Second Circuit's holding in this case, as well as encourage resolution by consent decrees because parties would be guaranteed that their obligations would not be expanded beyond their means.

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[2] Hereinafter, "*Firefighters*".

B. Federal courts' expansion of state obligations under a consent decree, absent an adjudication on the merits, raises significant federalism concerns.

Expansion of the terms of any consent decree raises the problem of federal courts exceeding their authority. Modification of institutional reform consent decrees raises additional significant federalism concerns where, as in this case, it allows a federal court to impose on a state governmental entity obligations to which the state did not agree, where no constitutional or federal violation has been adjudicated. Although this Court has never disallowed remedial relief ordered by a federal district court solely on the ground that it unconstitutionally intrudes on state sovereignty, the Court has held that such constraints do exist. In *Rufo*, this Court stated "[f]ederal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated." *Rufo*, 112 S.Ct. at 762.[3] These principles remain vital: only a few weeks ago, in *United States v. Lopez*, Justice Kennedy noted the Court's continuing duty "to consider [the federal

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[3] *See also Allen v. Wright*, 468 U.S. 737, 760-1 (1984); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 n.13 (1984); *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983); *Hills v. Gautreaux*, 425 U.S. 284, 293 (1976); *Rizzo v. Goode*, 423 U.S. 362, 379 (1976) ("appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief"); *Lorain NAACP v. Lorain Bd. of Education*, 979 F.2d 1141 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2998 (1993)

courts'] place [vis-a-vis the states] in the design of the Government and to appreciate the significance of federalism in the whole structure of the constitution." ___ U.S. ___, 63 U.S.L.W. 4343, 4350-51 (1995) (Kennedy, J., concurring). If allowed to stand, the Second Circuit's decision in this case and its progeny will weaken the principles of federalism which this Court upheld in *Rufo*, and recently reaffirmed in *Lopez*.

Ordinarily, federal equitable relief cannot be granted against a state unless a federal court has concluded that federal rights have been violated or the parties consent to a judgment.[4] This principle serves as a check on federal intrusion on state sovereignty. However, most consent decrees, as in this case, are entered into before federal rights or violations are adjudicated, so that a federal court's authority to enter the decree depends on the agreement of the state. *Firefighters*, 478 U.S. at 522. In *Firefighters*, this Court expressly affirmed a federal court's power to embody in a consent decree relief that it could not order had the case gone to trial -- because a consent decree represents a voluntary agreement of the parties. *Id.* at 522.[5] *Firefighters* confirms both the

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[4] *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (*Milliken I*); *also Milliken v. Bradley*, 433 U.S. 267, 281 (1977) (*Milliken II*); *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971).

[5] *See also Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *Sansom Comm. v. Lynn*, 735 F.2d 1535, 1538 (3d Cir.), *cert. denied sub nom. Trustees of University of Pennsylvania v. Sansom Comm.*, 469 U.S. 1017 (1984); *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125-26 (D.C. Cir. 1983), *cert. denied sub nom. Union Carbide Corp. Natural Resources Defense Council, Inc.*, 467 U.S. 1219 (1984); *E.E.O.C. v. Safeway Stores, Inc.*, 611 F.2d 795, 799-

broad scope of federal remedial power in a consent decree and the limits of that power -- to the terms to which the parties consented. Allowing federal courts to abuse their extraordinary consent decree powers, as the Second Circuit did here, stands the principle of *Firefighters* on its head.[6]

Moreover, where, as here, the federal court exceeded its authority vis-a-vis a state in going beyond the express terms of the decree, basic principles of federalism are also threatened. Because it is a substantially greater federal intrusion on state sovereignty to impose equitable remedies on a state governmental entity when it has not actually violated a plaintiff's federal rights, federalism concerns are stronger where federal courts seek unilaterally to modify consent decrees so as to impose on the state governmental entity obligations beyond those to which the state agreed. Indeed, this Court in *Rufo* indicated that the district court erred in looking beyond the express terms of the consent decree in rejecting limited double celling of pretrial detainees. *Rufo*, 112 S.Ct. at 761. *Rufo* suggests a rule consistent with *Amici's* position here: a state may agree to relief beyond the terms of a consent decree, but cannot be required to provide such relief, at least absent an adjudicated violation of federal law. *See*, *id.* at 762. Rather, the

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800 (10th Cir. 1979), *cert. denied sub nom. Courtwright v. E.E.O.C.*, 446 U.S. 952 (1980).

[6] *See Fox v. United States Dep't of Housing and Urban Dev.*, 680 F.2d 315 (3d Cir. 1982) (imposing additional duties on defendants is unauthorized if the court has not adjudicated that defendant violated plaintiff's rights, absent exceptional circumstances).

enforceable obligations of the state must be determined by the express terms of the decree.

There are basic structural reasons for restricting federal courts to the text of a decree: in unilaterally increasing the obligations of a state governmental entity, federal courts may also violate provisions of the party state's constitution. For example, when a federal district court modifies a consent decree to require the state's legislature to fund the terms of the decree or to require a state governmental entity to re-prioritize legislative funding to comply with the decree, this constitutes a federally mandated violation of the state constitution's separation of powers provision[7] and may raise Tenth[8] or Eleventh Amendment[9] issues as well.

Finally, the general inapplicability to federal consent decrees of other federalism-serving doctrines, such as the Article III "case or controversy"[10] requirement and the Eleventh Amendment, renders equitable relief under consent

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[7] *See United States v. Board of Education*, 588 F. Supp. 132 (N.D. Ill.) (district court ordered Department of Education to set aside $14.6 million in appropriations to desegregate Chicago's schools), *reversed*, 744 F.2d 1300 (7th Cir. 1984) (held district court misinterpreted consent decree; issue of whether district court violated the federal separation of powers provision was not reached), *cert. denied*, 471 U.S. 1116 (1985).

[8] U.S. CONST. amend. X.

[9] U.S. CONST. amend. XI. *See Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983) (requirement that state fund general legal services for prisoners void under Oregon constitution's separation of powers provision and the Eleventh Amendment).

[10] U.S. CONST. art. III, § 2.

decrees even more problematic. This Court has held that consent decrees do not run afoul of the constitutional "case or controversy" requirement.[11] Moreover, most federal courts that have held that the provisions of the Eleventh Amendment are generally inapplicable to federal consent decrees against state governmental entities for different reasons. First, because consent decrees mandate prospective relief against state officials, they do not fall within the scope of the Eleventh Amendment.[12] Second, the state's consent to the decree may constitute a waiver of its immunity from suit in federal court.[13] Finally, some courts have held that any order enforcing a valid consent decree is not barred by the Eleventh Amendment.[14] While the application of the Eleventh Amendment in the context of federal consent decrees is complex, it seems clear that both of these

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[11] *Swift & Co. v. United States*, 276 U.S. 311 (1928)

[12] *See Wisconsin Hosp. Ass'n v. Reivitz*, 820 F.2d 863, 868 (7th Cir. 1987); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 596 F.2d 27, 39 (2d Cir.), *cert. denied sub nom. Coughlin v. New York State Ass'n for Retarded Children, Inc.*, 444 U.S. 836 (1979); *Vecchione v. Wohlgemuth*, 558 F.2d 150, 158 (3d Cir.), *cert. denied sub nom. Beal v. Vecchione*, 434 U.S. 943 (1977); *but see Pennhurst, supra*, footnote 3 (prospective relief against state officials under state law barred by the Eleventh Amendment); *cf. Ex parte Young*, 209 U.S. 123, 155-56 (1908) (prospective relief against state officers not barred by Eleventh Amendment).

[13] *See Carey*, 596 F.2d at 39; *Jordan v. Fusari*, 496 F.2d 646, 651 (2d Cir. 1974); *Laura I. v. Clausen*, 676 F. Supp. 717, 719 (M.D. La. 1988).

[14] *See Hutto v. Finney*, 437 U.S. 678, 691-92 (1978) (monetary penalties imposed to enforce an injunction are not barred by the Eleventh Amendment); *Reivitz*, 820 F.2d at 868; *Vecchione*, 558 F.2d at 158.

doctrines, that regularly limit the scope of federal injunctive power and serve federalism goals, do not usually apply to the entry and enforcement of consent decrees. Their inapplicability to consent decrees increases the risk that federal courts may inadvertently modify a decree in violation of state sovereignty.

Indeed, several federal courts of appeal have refused to modify consent decrees because they have realized the dangers of allowing federal courts to expand state obligations under a consent decree absent a violation of federal rights. For example, in *Johnson v. Robinson*, 987 F.2d 1043 (4th Cir. 1993), the Fourth Circuit held that the district court abused its authority under a consent decree involving Maryland's prison system when it adopted a timetable which was not in the decree, within which Maryland prison officials had to make 83 improvements at prison facilities. The court emphasized that the parties never formally agreed upon the duties in the specified timetable, which added substantially to those accepted by prison officials in the original decree. Thus, the court held that because the binding force of a consent decree comes from the agreement of the parties, the district court may not use its decree enforcing power to enlarge or diminish the duties to which the parties have agreed and which the court has approved.

Similarly, in *United States v. Michigan*, 940 F. 2d 143 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 115 S.Ct. 312 (1994), the Sixth Circuit held that the district court abused its discretion and overly intruded upon the sovereignty of the state of Michigan when it unilaterally modified and extended a program classification plan for prisons being used by Michigan, where program

classification was excluded from the consent decree. In this action, the United States and Michigan had entered into a consent decree to resolve alleged violations of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997. In implementing the consent decree, the district court issued five orders requiring Michigan to justify, explain, and validate the program classification plan, and requiring that the plan encompass a state-wide classification system. On appeal, the circuit court held that the district court abused its discretion when it modified and extended the plan.

The Tenth Circuit likewise vacated a district court's modification of a consent decree because the court found that the district court unilaterally discarded the balance struck by the parties concerning duration and procedures for dismissing the consent decree and substituted its own procedures and time frame. *United States v. Colorado*, 937 F.2d 505 (10th Cir. 1991). The Tenth Circuit concluded that the district court abused its discretion in modifying the proposed consent decree and remanded the case for further proceedings to determine whether the parties' unmodified stipulations, should be accepted or not.[15]

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[15] *See Woodson v. Sully*, 801 F. Supp. 466 (D. Kan. 1992) (district court refused needed modification because found proposed amendment involved too great an intrusion by the court into management of county, especially where parties were not in agreement); and *see also Jacksonville Branch, NAACP v. Duval County School Bd.*, 978 F.2d 1574 (11th Cir. 1992) (NAACP not entitled to modify consent decree to restrict school board's freedom to implement its school desegregation plan, absent plan's failure to accomplish consent decree objectives).

Unlike the Second Circuit, these courts properly considered the effect of a federal court's unilateral modification of a consent decree on state sovereignty. Had these modifications been allowed, courts would be free to rewrite the terms of consent decrees entered into by governmental entities. Such a result will either weaken the structural guarantees of federalism or effectively prohibit the use of consent decrees by governmental entities altogether.

One of the advantages of a consent decree is that both parties have an investment in the success of the decree.[16] Accordingly, compliance is usually not a problem. However, when a court unilaterally modifies a decree, it necessarily disturbs the balance struck by the parties.[17] As a result, cooperation and compliance from the parties may become increasingly difficult.

The most obvious effect of the Second Circuit's decision is that federal and state governmental agencies will be prohibited from resolving institutional reform litigation through consent decrees. For example, in 1986, the Attorney General of the United States issued guidelines to Department of Justice attorneys instructing them not to enter into consent decrees that would bind the executive discretion

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[16] *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[17] *See Duran v. Elrod*, 713 F.2d 292, 296-97 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984); *United States v. Motor Vehicle Mfrs. Ass'n*, 643 F.2d 644, 651 (9th Cir. 1981); *United States v. City of Providence*, 492 F. Supp. 602, 608 (D.R.I. 1980); *United States v. Shubert*, 163 F. Supp. 123, 124 (S.D.N.Y. 1958).

of subsequent administrations.[18] This policy was the result of three cases: (1) *Ferrell v. Pierce*, 743 F.2d 454 (7th Cir. 1984), where a district court refused to allow the Department of Housing and Urban Development to adopt a congressionally approved alternative to the assignment program required by a decree; (2) *United States v. Board of Education*, 588 F. Supp. 132 (N.D. Ill.), *vacated*, 744 F.2d 1300 (7th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), where a district court interpreted a consent decree to require affirmative legislative and other funding efforts by the executive branch; and (3) *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied sub nom. Union Carbide Corp. v. Natural Resources Defense Council, Inc.*, 446 U.S. 952 (1980), where, despite Congress's enactment of the Clean Water Act of 1977, a district court refused to vacate a consent decree that specified methodology and criteria to be used by the EPA in amending regulations.[19]

The Attorney General believed that using consent decrees which circumscribed the executive discretion of subsequent administrations unconstitutionally expanded judicial power at the expense of the executive and legislative branches of government. Thus, the policy was directed to avoid the result of *Ferrell*, *Board of Education* and

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[18] *See* Paul D. Windsor, *Separation of Powers and the Reagan Administration's Policy on Consent Decrees: Have the Courts Overstepped the Limits of Judicial Powers?*, 1989 Ill. L. Rev. 541, 567-70 (1989). (Appendix).

[19] *See Gorsuch*, 718 F.2d at 1130 (Wilkey, J., dissenting) ("such decrees invite judicial abuse of the separation of powers doctrine").

Gorsuch. Specifically, the policy forbade consent decrees that encroached upon an executive department's or government agency's discretionary power to: (1) promulgate regulations; (2) seek or spend funds; and (3) perform other discretionary activities. Some states have also shared the federal government's response to consent decrees. For example, Florida Governor Lawton Chiles will not approve any consent decrees to which the state or one of its agencies is a party.[20] As a result, institutional reform cases will go to trial in federal court rather than be resolved through consent decree, and the benefits of consent decrees will be lost.[21]

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[20] See Declaration of Kimberly Tucker, General Counsel, Florida Department of Health and Rehabilitative Services, dated May 18, 1995 (signed original lodged with the Court).

[21] In several civil rights areas where consent decrees are commonplace, Congress affirmatively expressed its preference for voluntary resolution. *See, e.g., Firefighters*, 478 U.S. at 524 n.13 (legislative history of Title VII reflects congressional preference for voluntary remedial action). The Second Circuit's view of consent decree modification, like the Union's view of consent decrees in *Firefighters*, would make it substantially more difficult to settle litigation under those statutes, contrary to the expressed legislative preference.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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May 22, 1995